

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO. 309 OF 2005

SMT.ANTONETA GOMES AND 5 ORS.,

....Petitioners

Versus

SHRI FLORENCE JACINTO
DIAS(SIN.DEC.) REP.BY LEGAL HEIRS

....Respondents

Shri S.S. Kantak, Advocate for the Petitioners.

Coram:- R. M. LODHA, J.

Date:- 21st October, 2005

P.C.:

Heard Shri S.S. Kantak, learned Advocate for the Petitioners.

2. The impugned order does not call for any interference.

3. It would be seen that the suit was filed by the present petitioners in 1982. The suit proceeded with snail's pace. Almost after 16 years of filing of the suit, on 16.02.1998, the matter was fixed for further cross examination of P.W.1. On that day neither P.W.1 who was to be cross-examined appeared nor his lawyer appeared. Constrained thereby the trial Court dismissed the plaintiffs suit by the following Order :-

" Called out today. The plaintiff and their adv. Shri Shah and Fal Dessai absent. The defendant represented by Adv. Braganza. Today matter is fixed for further cross examination of PW1 Antoneta Gomes. Matter was called first at 10.40 a.m. by Court bailiff & in absence of the plaintiffs & their advocate matter kept back. Again case was called at 11.00 a.m. in absence of the plaintiffs the matter was once again kept back. Finally matter was called at 11.10 a.m. by the court bailiff. The plaintiffs absent. On perusal of daily proceedings of this case it may be observed that this

suit is filed way back in the year 1982 & issues framed on 4/9/92. Thereafter matter adjourned for plaintiffs evidence on 18/12/92, 5/4/93, 7/7/93, 1/11/93, 21/2/94, 4/7/94, 24/8/94, 31/10/94, 27/1/95, 21/6/95, 6/9/95, 24/11/95 and 11/3/96. Records further reveal that on 15/7/96 evidence of Pw1 was partly recorded & matter was fixed for further examination in chief of PW1 on 2/9/96. However matter was again adjourned that day and on 18/10/96, 13/12/96 & 28/2/97 on 2/4/97 further chief of PW1 was recorded fixing the matter for cross examination of PW1. Records further reveal that cross of PW1 was partly recorded on 11.8.97.

As the case is very old more than 15 years clear date was given in the matter. Today I fixed only two matters on board for evidence including this case with clear direction that matter will be taken up for evidence & in no circumstances it will be adjourned inspite of it the plaintiffs absent without showing any sufficient cause. I therefore dismiss the suit on the ground of default. "

4. On 18.3.1998, the plaintiffs made an application for restoration of the suit. The said application was registered as CMA 48/1998/A. The application for restoration of the suit was contested by the defendants by filing reply on 29.6.1998. The application for restoration of the suit came up for consideration before the court below on 17.9.1998. In support of the application on that day neither the plaintiffs nor their advocate appeared, resulting in dismissal of that application by Order dated 7.8.1998. The plaintiffs then made an application on 7.9.1998 for restoration of CMA No.48/98/A. The said application was registered as CMA 175/98/A. Civil Application being CMA 175/98/A for restoration of CMA 48/98/A came up for consideration on 19.7.1999. On that day also none appeared for the plaintiffs and accordingly CMA 175/98/A was dismissed in default. To complete the narration of facts it may be stated here that on 4.1.1999, the application was made by the plaintiffs for deletion of some of the defendants. No steps were taken in that regard as well and accordingly CMA 175/98/A came up for consideration before the trial Court on 19.7.1999. The trial Court found that not only the

plaintiffs and their Advocates were absent, but also no steps were taken with regard to the application dated 4.1.1999.

5. Aggrieved by the Order dated 19.7.1999 dismissing CMA 175/98/A in default and for want of prosecution, the present petitioners preferred appeal before the appeal Court which came up for consideration before the Appeal Court at Margao. By the Order dated 14.9.1993 the Addl. District Judge, Margao dismissed the appeal. The appeal Court observed thus :-

"It is to be noted here that the application was filed by the present applicant for restoration of suit since the suit itself dismissed for default by the Learned Trial Court. The said application for restoration was also dismissed on two counters i.e. for non-appearance of the applicants and their Counsel as well as for not taking steps for other defendants and their legal representatives. After carefully perusing the roznama of Civil Misc. Application No.175/98, it is clear that in the said proceedings some of the respondents/defendants were not served. It is to be further noted that the suit was dismissed by the Learned Trial Court and it was necessary to serve the other respondents before restoring the suit to the file of the Trial Court. Subsequently the present applicant moved an application to drop the defendant nos.6, 7, and 8 from the cause title of the restoration application, which is at exhibit 5 dated 4.1.1999, wherein it was disclosed that the said defendant nos.6, 7 and 8 were not served in the restoration proceedings. Further it is required to be noted that the said application filed by the present applicant came to be rejected by the Learned Trial Court vide its Order dated 9.6.1999 which is at exhibit 7 in the said Civil Misc. Application No.175/1998. The observations of the Learned Trial Court in para 7 of the said order are also important for the purpose of this appeal. The Learned Trial Court observed that the suit is for declaration and it appears that the defendant nos.3, 4 and 5 are dead. The learned Counsel for the defendants reported vide his application dated 10.2.1992 about the death of defendant no.4 but the plaintiff failed to take steps or bring their legal heirs on record. It is also observed by the Learned Trial

Court that there was some endorsement on exhibit 18 that all eligible legal heirs of the deceased are already on record. The Learned Trial Court further observed that the names of defendant nos.6, 7 and 8 cannot be dropped from the cause title of the restoration application. Since orders cannot be passed partly allowing the restoration application against some of the defendants while the suit has been dismissed against all the defendants. Therefore the Learned Trial Court dismissed the said application for deletion of defendant nos.6, 7 and 8 from the cause title and gave one more opportunity to the plaintiff to take proper steps in the matter.

Thereafter the matter was posted for taking steps i.e. for serving other defendants as defendant nos.1 and 2 appeared before the Trial Court. Since on 19.7.1999 neither the plaintiff nor their Counsel remained present, the Learned Trial Court observed in its impugned order that no further opportunity is required and dismissed the said Misc. Application for restoration for default as well as for not taking steps.

In order to appreciate it further, the provisions of Order 9 CPC which deals with the appearance of parties and consequently of non appearance, is required to be considered. Rule-1 discloses that the parties are required to be appeared on the day fixed in summons. Rule-2 provides for the consequence not serving the summons by the plaintiff on the defendants or his agent or in consequence of failure to pay cost. The relevant provision under Order 9 Rule 5 for the present purpose which is disclosed as under :-

"Dismissal of suit where plaintiff, after summons returned unserved, fails for (seven days) to apply for fresh summons: Where, after a summons has been issued to the defendant, or to one of several defendants, and returned unserved, the plaintiff fails, for a period of (seven days) from the date of the return made to the Court by the officer ordinarily certifying to the Court returns made by the serving officers, to apply for the issue of a fresh summons the Court shall make an order that the suit be dismissed as against such defendant, unless the plaintiff has within the said period satisfied the Court that ; (a) he has failed after using his best endeavours to discover the residence of the defendant who has not

been served, or (b) such defendant is avoiding service of process, or (c) there is any other sufficient cause of extending the time in which case the Court may extend the time for making such application for such period as it thinks fit. "

Therefore the said provisions of Order 9 Rule 5 is very clear in terms of failure of the plaintiff to apply for fresh summons within a specified period when the summon is returned unserved. The powers given to the Court are discretionary and it is clear that the Court is empowered to dismiss the suit itself. The same provisions will be applied to the Misc. Application such as restoration of the suit. It is to be noted here that the impugned Order also discloses that the said application has been dismissed for want of taking steps i.e. to serve the defendant nos.6, 7 and 8. The said Order is not appealable under Order 43 Rule-1 CPC. No doubt the dismissal of the application for restoration on default is appealable under Order 43 Rule-1 CPC and on that count the present appeal is tenable, but the Learned Trial Court has also dismissed the said application for restoration of the suit on the ground of not taking proper steps. As far as the maintainability of this appeal is concerned there is no doubt that the same is tenable against the Order of dismissal for default since by doing so the Learned Trial Court has dismissed the application under Order 9 Rule-9 CPC. However it is the duty of the plaintiffs/appellants to show that such Order is perverse or out of record. After perusing the record of Civil Misc. Application No.175/98 in Special Civil Suit No.30/1992. It is clear that the order passed by the Learned Trial Court is justified under such circumstances. The plaintiff failed to take proper steps to serve all the defendants in the said application and subsequently asked for deletion of defendant nos.6, 7 and 8 which was rejected by the Learned Trial Court and rightly so because the suit was dismissed against all the defendants and the restoration application cannot be filed only against few defendants excluding others. In these circumstances it was incumbent upon the plaintiff to serve all the defendants or their legal representatives in order to satisfy the Court for the purpose of restoration application.

It was argued by the Learned Counsel for the appellant that the

Learned Trial Court dismissed the said restoration application under undue-heast and thereafter the Advocate for the plaintiffs remained present in the Court and has filed an application but it was not taken on record. There is no such affidavit or the copy of application produced on record to show that the Learned Counsel for the plaintiff was present on that day after passing the said Order and submitted any applications. It is admitted fact that the plaintiff/appellant failed to serve all the parties to the said restoration application and also remained absent when the matter was posted for taking steps. Therefore there was no other option with the Learned Trial Court to dismiss the said application and there is no merit in the ground raised in the present appeal which could be considered for the purpose of disturbing the Order passed by the Learned Trial Court which is impugned in the present matter. Hence, I answer point no.1 in negative.

After considering the above discussion, it is clear that the present appeal has no substance and the same is required to be rejected. "

6. After the dismissal of the appeal, the plaintiffs again made an application before the trial Court for restoration of CMA 175/98/A along with application for condonation of delay. To say the least that was simply misadventure and abuse of the process of Court. The appeal against the Order dated 19.07.1999 having already been dismissed on 29.04.2003, there was no justification for the application being made by the plaintiffs for rightly dismissed vide the impugned Order dated 19.05.2005. The contumacious conduct that is reflected from the proceedings has disentitled the petitioners from invoking extraordinary jurisdiction of this Court. No interference is called for .

Writ Petition is dismissed in limine.

R. M. LODHA, J.

sl.